

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NOTICE OF PROPOSED AMENDMENTS TO FIFTH CIRCUIT RULES

Pursuant to 28 U.S.C. § 2071, we give notice the court is considering adoption of the following amendments to the 5TH CIR. R. Proposed language changes in the rules are shown with a shaded background if viewed in paper copy, or in “redline text” if viewed in certain word processing software. Deleted language is stricken through.

We must **receive** written comments on the proposed changes to the 5TH CIR. R. no later than July 21, 2004. The address to use is:

Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 Camp Street
New Orleans, LA 70130

You may also offer comments in electronic form to Rules_Changes@ca5.uscourts.gov

The proposed amendments are at the enclosure. Explanatory comments follow the proposed changes.

Charles R. Fulbruge III
Clerk of Court

ENCLOSURE

5TH CIR. R. 30.1. *Records on Appeal/Record Excerpts/Appendix - Appeals from District Courts, the Tax Court, and Agencies.* Appeals from district courts and the Tax Court are decided on the original record *on appeal*(ROA). The clerk is authorized to require the party receiving the ROA to pay reasonable shipping costs as a condition of receiving the record. Moreover, counsel and unrepresented parties must review the ROA within 20 days of dispatch from the clerk's office and advise electronically or in writing both the appropriate District Court (or the Tax Court, if appropriate) and Fifth Circuit clerk's offices of any errors in, or omissions from, the ROA. Failure to comply may result in a denial of any requested extension of time to file a brief due to an alleged error in, or incomplete ROA. Record excerpts are filed in lieu of the appendix prescribed by FED. R. APP. P. 30. Petitions for review or enforcement of agency orders are governed by 5TH CIR. R. 30.2, *but parties may be required to pay reasonable shipping costs, and are responsible for timely review of the record and the notification requirements set out above.*

5TH CIR. R. 30.2. *Appendix - Agency Review Proceedings.* Petitions for review *or enforcement* of orders of an administrative agency, board, commission or officer must proceed on the original record on review, without a FED. R. APP. P. 30 required appendix. *If a party requests use of the original record, the clerk may require payment of reasonable shipping costs, and the party is responsible for timely review and notification to the agency and the Fifth Circuit clerk's office of any record deficiencies, see 5TH CIR. R. 30.1.*

COMMENT: Due to severe reductions in the Judiciary's budget, the court cannot continue to bear the cost of shipping the paper record on appeal to counsel, or non-incarcerated pro se litigants who pay full filing fees. During calendar year 2003, the court spent an estimated \$35,000 to ship these records. Counsel and non-incarcerated pro se litigants proceeding in this court do not bear the cost of preparing a Joint Appendix, as required by other federal appellate courts. Because the average cost of shipping a paper record is less than \$10.00, the court does not believe the proposed fee is an unreasonable burden upon litigants. Further, as the district courts move to electronic records on appeal with the new Case Management/Electronic Case Filing (CM/ECF) system, the court plans to send the record to litigants in electronic form whenever possible. To encourage use of electronic records, we will charge for shipment of the paper record on appeal.

The requirement to review the record on appeal and to notify the courts of errors in

the record has two goals. First, the court is determined to reduce the number of last minute motions to extend the filing of briefs because counsel ostensibly has just “discovered” errors in, or omissions from, the record on appeal. These requests burden the court and delay the prompt adjudication of the cases. The amendment requires counsel and non-incarcerated pro se litigants, who pay the full filing fees, to review the record promptly after receipt from the court, and to notify the appropriate court clerks of any record deficiencies. Second, because our court will continue to require a paper record on appeal from the district court, we wish to simplify the district court’s task and their costs by insuring that the record is complete and correct *before* it is printed.

5TH CIR. R. 31.1. Briefs - Number of Copies; Computer Generated Briefs. Only 7 paper copies of briefs need be filed. Where a party is represented by counsel and generates his or her brief by computer, ~~and unless the clerk permits electronic filing in another method, the party must file one computer readable diskette copy of the brief with the clerk~~ *submit an electronic version of the brief to the court.* The filing party ~~also must also serve a computer readable diskette copy~~ *an electronic version of the brief* on each party separately represented by counsel, ~~unless by such means as counsel agree to in writing to another method of electronic service, or by the same means as submitted to the court~~ *The diskette filed with the court must contain nothing more than the brief. The electronic version of the brief submitted to the court must be in a form specified by the clerk. The electronic version must:*

~~The brief must be prepared in a single Portable Document File~~ *Format (PDF) format file. (Briefs scanned into PDF are not acceptable);*

contain nothing other than the brief;

have on the first page: The diskette’s label must include the case name number and caption; docket number, identify identity of the brief, i.e. appellant’s brief, appellee’s brief, etc.; and counsel’s name, address and telephone number. The brief must be on a 3½ inch diskette.

If the clerk permits counsel to submit the electronic version of the brief on a diskette, CD, etc., the label must contain the case name and docket number, and identify the brief as the appellant’s, appellee’s, etc.

The certificate of service must indicate service in both paper and electronic form, see FED. R. APP. P. 25(d)(1)(B).

COMMENT: The amendments are made to avoid three primary problems experienced when loading the electronic version of the brief into the court's database. First, briefs with multiple files must be consolidated by the clerk's office. Second, scanned PDF files take up excessive memory and cannot be indexed. Third, unless the electronic version contains the identification of the case, type of brief, and counsel's name and phone number, the court has difficulty in reviewing the brief in electronic form and contacting the attorney filing the brief.

5TH CIR. R. 47.10.3. The Appellate Record.

(e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them ~~in writing, setting forth the reasons why access to such information is necessary to the appeal.~~ from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings.

COMMENT: The amendment is designed to make the process of requesting a copy of the presentence investigation report easier for counsel. We envision allowing telephonic requests possibly followed-up by a confirmation letter from counsel, or e-mail communications, etc. This should speed processing of the requests.